

AUG - 8 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 11
)	
DERRICK L. PATTERSON,)	CASE NO. 07-61961-MHM
)	
Debtor.)	

**ORDER REGARDING EMPLOYMENT
APPLICATION OF K.A. FOREMAN**

This case commenced as a case under Chapter 11 February 5, 2007. At the time this case was filed, Debtor was represented by Diana McDonald. On July 20, 2007, Ms. McDonald filed a Consent Motion for her withdrawal as attorney for Debtor. Because that Consent Motion was deficient, an amended Certificate of Consent was filed July 27, 2007, which provided for Ms. McDonald's withdrawal and substitution of K.A. Foreman as attorney for Debtor. This case was converted to a Chapter 7 case July 23, 2007. Ms. McDonald has not filed an application for compensation.

On July 29, 2007, Debtor filed an application (the "Application") to employ K.A. Foreman as attorney for debtor. The Application incorrectly sets forth that Debtor "continues as debtor in possession and is managing his property and affairs." In fact, as of the date the Application was filed, the case had been converted to a Chapter 7 case, Neil C. Gordon had been appointed Chapter 7 Trustee and had filed a motion to compel Debtor to provide an accounting and turn over property of the estate. Therefore, although Debtor may hope to be continuing "as debtor in possession and is managing his property and

affairs," he no longer has the rights to do so, as all property of the estate is now vested in the Chapter 7 Trustee.

Upon appointment of a Chapter 7 Trustee, the Trustee replaces debtor-in-possession for the purposes of the administration of the estate and operation of its business; likewise, the Trustee's attorney displaces the debtor's attorney. *In re NRG Resources, Inc.*, 64 B.R. 643 (W.D.La. 1986). An attorney employed by a Chapter 11 debtor who continues to perform services after conversion and appointment of a Chapter 7 Trustee may be compensated from property of the estate only if the attorney is either retained by Trustee for a specific and limited special purpose with prior court approval or performs services that are beneficial to the administration of the estate. *In re Xebec*, 147 B.R. 518 (9th Cir. BAP 1992); *In re Sugarman*, 137 B.R. 391 (Bankr. S.D.Cal. 1992); *In re TS Industries, Inc.*, 125 B.R. 638 (Bankr. D. Utah 1991); *In re Ginji Corp.*, 117 B.R. 983 (Bankr. D. Nev. 1990). Therefore, it appears that the Application is unnecessary, as Mr. Foreman is not entitled to compensation paid from property of the estate.

The Application also sets forth that Mr. Foreman has been paid a retainer of \$3,500. This retainer, apparently paid postpetition, was paid without Debtor's seeking or obtaining permission of the bankruptcy court. Payment of postpetition retainers or compensation without proper notice and without court authorization is prohibited. *Grassmueck v. Samsky (In re E Z Feed Cube Co. Ltd.)*, 123 B.R. 69 (Bankr. D. Or. 1991). This is especially so when the postpetition retainer was paid from property of the estate that is, as of the date of

conversion, vested in the Chapter 7 Trustee. Therefore, Mr. Foreman should turn over the postpetition retainer to the Chapter 7 Trustee.

The affidavit accompanying the Application sets forth that Mr. Foreman is disinterested. Section 101(14) defines "disinterested person" as a person who:

- (A) is not a creditor, an equity security holder, or an insider;
- (B) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
- (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason[.]

At the hearing held July 31, 2007, on Trustee's motion to compel turnover and an accounting, however, Mr. Foreman disclosed that he also represents Debtor's former spouse, Sibyl Patterson, in her Chapter 7 bankruptcy case and that Ms. Patterson is an officer in a corporation owned by Debtor. Thus, even if it were otherwise appropriate for Mr. Foreman to seek approval of his employment and to seek payment of compensation from property of the estate, it appears that Mr. Foreman may have a disqualifying conflict of interest due to the dual representation of Debtor and his former spouse.

Finally, in the Disclosure of Compensation filed July 29, 2007, Mr. Foreman sets forth that Debtor's former attorney, Diana McDonald, represented that the prepetition retainer paid to her in connection with her representation of Debtor has been exhausted. Ms. McDonald, however, has filed no application for compensation. Pursuant to 11 U.S.C. §329, the bankruptcy court may examine and require the refund of all or any portion of any

fee paid by or on behalf of a debtor to a professional, whether paid for services rendered prepetition in contemplation of filing a bankruptcy petition or postpetition. *See, In re C & P Auto Transport, Inc.*, 94 B.R. 682 (Bankr. E.D. Cal. 1988); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bankr. N.D. Tex. 1986). As the bankruptcy court has the duty of evaluating the reasonableness and necessity of services rendered both prepetition and postpetition and as a prepetition retainer is property of the estate, it is inappropriate for a Chapter 11 debtor's attorney to remove fees before approval by the bankruptcy court. *In re Printing Dimensions, Inc.*, 153 B.R. 715 (Bankr. D. Md. 1993); *In the Matter of Peter J. Quist*, 1997 WL 173933 (Ga., April 14, 1997). Accordingly, it is hereby


ORDERED that the application of K.A. Foreman for approval of his employment as attorney for Debtor is denied as unnecessary. It is further

ORDERED that, within 15 days of the date of entry of this order, Mr. Foreman shall turn over to the Chapter 7 Trustee the \$3,500 postpetition retainer paid to him. It is further

ORDERED that, within 20 days of the date of entry of this order, Ms. Diana McDonald shall file, pursuant to 11 U.S.C. §§330 and Bankruptcy Rule 2016, an appropriately detailed application that complies with the Guidelines established by the U.S. Trustee. If no such application is filed within the time allowed, Ms. McDonald shall promptly turn over to the Chapter 7 Trustee the full amount of any prepetition or postpetition retainer paid to her by Debtor.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's current and former attorneys, the Chapter 7 Trustee, and the U.S. Trustee.

IT IS SO ORDERED, this the 7th day of August, 2007.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE